Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1776

IN THE

Supreme Court of the United States

October Term, 1985

CLARENCE H. HOLDING

Petitioner,

v.

SOVRAN BANK, EXECUTOR AND TRUSTEE UNDER THE WILL OF LILLIAN J. MUSE

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Virginia

Scott S. Cairns (Counsel of Record)
J. William Boland
MCGUIRE, WOODS & Battle
One James Center
Richmond, Virginia 23219
(804) 644-4131
Attorneys for Respondent.

APPELLATE PRINTING SERVICES INC HERITAGE BLDG RICHMOND VA (804) 643-7739

Questions Presented for Review

Should this Court review the Supreme Court of Virginia's denial of Petitioner's petition for appeal where Petitioner failed to comply with the Virginia Rule of Court requiring appellant to make a transcript or written statement of the proceedings below part of the record on appeal,

and

Where the decision of the Supreme Court of Virginia was based solely on state grounds and no federal question was presented?

Parties to the Proceeding

Petitioner in this Court and defendant/ appellant below:
.....Clarence H. Holding

Respondent in this Court and plaintiff/ appellee below:
.....Sovran Bank, N.A., as Executor and Trustee under the Will of Lillian J. Muse, Deceased[1]

Other defendants in the lower court, not parties to Petitioner's petition for appeal in the Supreme Court of Virginia or to this action:
.....Thomas R. Gale
Bertha J. Gale
The Trustees of Roanoke College
The Virginia Museum of Fine Arts

---

[1] Sovran Bank, N.A., is a wholly-owned subsidiary of Sovran Financial Corporation. Other than wholly-owned subsidiaries of Sovran Financial Corporation, neither Sovran Financial Corporation nor Sovran Bank, N.A. has any subsidiaries or affiliates.

Table of Contents

Questions Presented for Review.....i

Parties to the Proceeding.....ii

Table of Authorities.....iv

Opinion Delivered in the Court Below.....vi

Grounds on Which the Jurisdiction of this Court is Invoked.....vii

Statutes Involved.....viii

Statement of the Case.....1

Reasons for Denying the Petition.....6

A. The Supreme Court of Virginia Correctly Found that Mr. Holding had not Complied with its Rules in Filing his Petition for Appeal.....7

B. No Federal Question Arises from this Case Because the State Court Proceedings Complied with Constitutional Standards..... 9

Conclusion.....12

Certificate of Service..... 13

Table of Authorities

Cases — Page(s)

Town of Falls Church v County Bd., 166 Va. 192, 184 S.E.2d 459 (1936) ...10

Backus v. Port Street Union Depot Co., 169 U.S. 557 (1898) 10

Green v. Elbert, 137, U.S. 615 (1981) 8

Rudacille v. State Commission 155 Va. 808, 817, 156 S.E. 829 (1931) 10

Chicago & N. R. Co. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) 11

Supreme Court Rules

Rule 17 of the Supreme Court of the United States..... vii, 6

Statutes

28 U.S.C. § 1257(3).....vii, 6

Miscellaneous

Rule 5:11 of the Rules of the Supreme Court of Virginia.....passim

Opinion Delivered in the Court Below

The December 31, 1985 and January 17, 1986 Orders of the Supreme Court of Virginia, of which Petitioner seeks review, are retyped as Exhibit 6, page 10 and Exhibit 7, page 11 to Petitioner's brief.

The Circuit Court's opinion of July 11, 1985 is retyped as Exhibit 1 to Petitioner's brief.

Grounds on Which the Jurisdiction of this Court is Invoked

Respondent denies that this Court has jurisdiction because Petitioner's Petition for Writ of Certiorari contains no allegations sufficient to support jurisdiction under Rule 17 of the Rules of this Court, nor does the Petition make any allegation that calls into question the constitutionality of a state statute. See 28 U.S.C. 1257(3).

Statutes Involved

The Petitioner's Petition for Appeal was denied for failure to provide the Virginia Supreme Court a record of the trial court proceedings. Rule 5:11 of the Rules of the Supreme Court of Virginia, which states the procedures for completing the record, provides:

> (a) Transcript. - The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.
>
> (b) Notice. - Counsel for appellant shall promptly notify all other counsel of the date on which the transcript is filed.
>
> (c) Written Statement. - In lieu of a transcript, a written statement of facts, testimony, and other incidents of the case, which may include or consist of a portion

of the transcript, becomes a part of the record when:

(1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; and

(2) the statement is signed by the trial judge and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy or completeness of the statement, it shall be signed in accordance with subsection (d) of this Rule.

(d) Objections. - Any party may object to a transcript or written statement on the ground that it is erroneous or incomplete. Notice of such objection specifying the errors alleged or deficiencies asserted shall be filed with the clerk of the trial court within 15 days after the date of mailing of the notice of

filing the transcript (subsection (b) of this Rule) or within 15 days after mailing of the notice of filing the written statement (subsection (c) of this Rule) is filed in the office of the clerk of the trial court, or if the transcript of written statement is filed before the notice of appeal is filed, within 10 days after the notice of appeal has been filed with the clerk of the trial court. Counsel for the objecting party shall give the trial judge prompt notice of the filing of such objections. Within ten days after the notice of objections is filed with the clerk of the trial court, the judge shall:

(1) overrule the objection;

(2) many any corrections that he deems necessary;

(3) include any accurate additions to make the record complete;

(4) certify the manner in which the record is incomplete; and

(5) sign the transcript or written statement.

At any time while the record remains in the office of the clerk of the trial court, the trial judge may, after notice to counsel and hearing, correct the transcript or written statement.

No. 85-1776

In the
Supreme Court of the United States
October Term, 1985

CLARENCE H. HOLDING,

Petitioner,

v.

SOVRAN BANK, EXECUTOR AND TRUSTEE UNDER THE WILL OF LILLIAN J. MUSE, DECEASED,

Respondent.

Brief in Opposition to
Petition for Writ of Certiorari
To the Supreme Court of Virginia

Statement of the Case

Sovran Bank, N.A. ("Sovran"), is the executor and trustee under the will of Lillian J. Muse, who died on

August 13, 1983. Sovran filed this action on behalf of the estate on December 16, 1983 in the Circuit Court for the City of Richmond, seeking a declaratory judgment with respect to the rights, if any, of Petitioner, Clarence H. Holding ("Holding") in a parcel of real estate known as Blue Bell Farm, located in Powhatan County, Virginia. In addition, Sovran sought an accounting, damages and a declaration that a certain deed concerning Blue Bell Farm be declared null and void. Because the Richmond Circuit Court felt that the County of Powhatan was a preferable venue for this action, the Richmond Circuit Court action was

dismissed without prejudice and refiled in the Circuit Court of the County of Powhatan on August 16, 1984.

Following a two-day trial, the jury, on issues out of chancery requested by Holding, found that the deed in question was not a deed of gift as Holding claimed. The Circuit Court accepted the findings of the jury and further found that the deed was a deed of bargain and sale for which Holding had paid no consideration. The Circuit Court

entered a decree in favor of Sovran in the amount of $100,000.[2]

Mr. Holding noted his appeal and filed with the Circuit Court a "Statement of Case". Sovran filed its objections to the Statement on the grounds that it was erroneous and incomplete. Because a transcript was available for submission as a complete record of the evidence presented at trial and of various rulings of the Court, the Circuit Court directed Holding to present that transcript. Holding did not do so and the Circuit Court refused to

---

[2] Exhibit 1 to the Petition for Writ of Certiori.

certify Mr. Holding's Statement, finding that the Statement was inaccurate in its description of testimony presented and incomplete in its omission of testimony of many witnesses. In addition, the Circuit Court sustained the objections made by Sovran to the Statement.

On September 9, 1985, Mr. Holding filed a Petition for Appeal with the Supreme Court of Virginia. On October 3, Sovran filed a Motion to Dismiss. On December 31, 1985, the Supreme Court of Virginia dismissed the Petition for Appeal for failure to comply with Rule 5:11 of the Rules of the Supreme Court of Virginia, as Holding failed to

present the court with either a transcript or a statement of fact certified by the trial court.

Holding sought a rehearing on his petition. On January 17, 1985, the Supreme Court denied his request.

Reasons for Denying the Petition

This is an ordinary case of a litigant failing to comply with a court's procedure. There are no issues in this action that meet the requirements of Rule 17 or of 28 U.S.C. § 1257(3). There are no special or important reasons for this Court to exercise its discretion and grant Holding's Petition.

A. The Supreme Court of Virginia Correctly Found that Holding had not Complied with its Rules in Filing his Petition for Appeal.

Plaintiff's Petition focuses primarily on the injustice he claims was done by the jury in this case in ruling against him. However, the Supreme Court of Virginia denied his Petition for Appeal, not based on the merits of his claim, but based on his failure to comply with Rule 5:11 of the Rules of the Supreme Court of Virginia. By failing to provide the Court with either a transcript of the trial or a statement of facts certified by the trial court, Holding made it impossible for the Court to review the record to determine if an injustice was done, because no record was presented to the Court. The

appellant has the primary responsibility of presenting evidence to the Supreme Court of Virginia in order to allow that Court to give full consideration to the assignment of error. Rule 5:11 provides a simple procedure for presenting the appellate court with an adequate record to review the decisions of the trial court. Holding failed to comply with those simple procedures.

In Green v. Elbert, 137 U.S. 615, 621 (1891), this Court stated:

> To the proper conduct of business of this court, rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the circumstances can be only extended when the circumstances furnish adequate excuse, were

> this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired.

Just as this Court has rules that must be followed, so does the Supreme Court of Virginia. That court properly dismissed Mr. Holding's petition for appeal for failure to comply with those rules.

B. No Federal Question Arises From This Case Because the State Court Proceedings Complied with Constitutional Standards.

Although Holding claims a violation of his constitutional rights, his Petition fails to explain how the Supreme Court of Virginia abridged those rights other than by claiming that they "misused Rule

5:11." The right to have a decision reviewed is not an absolute right in Virginia, but is subject to such conditions as the legislature may put upon it. Town of Falls Church v. County Bd., 166 Va. 192, 184 S.E.2d 459 (1936). Holding did not comply with those restrictions.

Moreover, under both federal and state law:

> The right of appeal is no part of due process of law. All that a litigant can ask is that in some appropriate way, before some duly constituted tribunal, its compensation shall be determined. Backus v. Port Street Union Depot Co., 169 U.S. 557 (1898). . . .

Rudacille v. State Commission, 155 Va. 808, 817, 156 S.E. 829 (1931). Mr. Holding had the opportunity to present his claims in the Circuit Court. As

Mr. Holding had no right to an appeal except in the discretion of the Supreme Court of Virginia, he can claim no constitutional deprivation in that court's decision to deny his petition.[3]

---

[3] Even if Mr. Holding did have a "right" to appeal the Circuit Court's decision, a restraint on access to that appeal would be invalidated only if it were so arbitrary, unequal, and oppressive as to shock the fairness the 14th Amendment was intended to satisfy. See Chicago & N. R. Co. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922). Clearly, the requirement that an appellant provide a record of the proceedings below does not meet this heavy burden.

Conclusion

There is no reason for this Court to review the Supreme Court of Virginia's refusal to grant Mr. Holding's petition for appeal. The decision of the Virginia Supreme Court is founded solely on state grounds, and the decision does not deny Mr. Holding any constitutional rights. Therefore, the Petition for Writ of Certiorari to review the decision of the Virginia Supreme Court should be denied.

Respectfully submitted,

Scott S. Cairns
(Counsel of Record)
J. William Boland
MCGUIRE, WOODS & BATTLE
One James Center
Richmond, Virginia 23219
(804) 644-4131
Attorneys for Respondent,
Sovran Bank, N.A., as
Executor and Trustee Under
the Will of Lillian J.
Muse, Deceased

CERTIFICATE OF SERVICE

I hereby certify that three true and exact copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Virginia were mailed, postage prepaid, this 30th day of May, 1986, to Clarence H. Holding, 1901 Woodbine Road, Richmond, Virginia 23225.